EXHIBIT 7
DATE 1/19/11
HB 232

JOHNSON
& WATERMAN
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January 19, 2011

Natural Resources Committee
Chairman Hendrick and Committee Members
House of Representatives
Montana State Legislature
Helena, Montana

RE: HB 232 - JEFFERSON COUNTY WRITTEN TESTIMONY IN OPPOSITION

Dear Chairman Hendrick and Committee Members:

Since the Montana Environmental Policy Act ("MEPA") was adopted, responsible state officials have been required to consult with "any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved" *before* an environmental impact statement (EIS) is made. 75-1-201(1)(c), MCA.

The requirement to consult with other state agencies is implemented by long standing administrative rules. For example, MEPA rules administered by the Montana Department of Environmental Quality ("DEQ") provide for cooperation with agencies having special expertise and the joint preparation of an EIS when more than one agency has jurisdiction. When consulted, state agencies are given a substantive role and are reimbursed for the cost of assisting in the preparation of the EIS. 17.4.626 and .627, ARM. This bill would treat local government officials differently, providing no ability to shape decisions that directly affect their jurisdictions.

Four sessions ago, MEPA was amended to require consultation between "responsible state officials" and local governments that may be directly impacted by any project before an EIS is made. HB 142 (2003). This is the same requirement that exists for state agencies with special expertise or jurisdiction. Yet, no administrative rule was adopted to implement this new consultation requirement. In fact, no action was taken until Jefferson County successfully sued DEQ in late 2010 for failing to consult with the county before preparing an EIS on the Mountain States Transmission Intertie ("MSTI"), a major transmission line proposed by Northwestern Energy ("NWE") to export power out of market.

HB 232 would strictly limit local government participation in decisions like MSTI that have a profound impacts on local jurisdictions. The bill should not pass out of committee because it is both poorly considered and poorly crafted.

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MEPA is patterned after the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 through 4347, ("NEPA") and the Montana Supreme Court relies on NEPA authorities when interpreting the requirements of MEPA. *Montana Wilderness Association v. Board of Health*, 171 Mont. 477, 505-06, 559 P.2d 1157, 1171-72 (1976). NEPA regulations mandate consultation with other state and local agencies at "**the earliest possible time** to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. 1501.2 **(emphasis added)**.

HB 232 is poorly considered because it would keep local government officials from participating in the critical early step of identifying issues for analysis and would cut them entirely out participating in the analysis of information that is collected. This is not consistent with the stated purposes of consultation to: reflect values, avoid delay and head off conflicts.

HB 232 is also poorly constructed. For example, Section 2 would amend the Major Facility Siting Act ("MFSA") to state that the MEPA requirement for consultation with local government is satisfied by consulting with local governments that are directly impacted when a pipeline or transmission line is constructed. But MEPA requires consultation with local governments that *may* be impacted *before* the EIS is made. In the case of pipelines or transmission lines, it is not possible to limit consultation to local governments that are impacted because until the EIS is complete no routing alternative can be selected and the location of impacts cannot be known.

Sloppy drafting is to be expected in a bill that was conceived less than one month ago to reverse a court decision entered against DEQ in December 2010. At issue in that case is whether DEQ must consult with Jefferson County about the probable impacts of MSTI, a 500 kV transmission line proposed for construction by NWE, *before* DEQ makes a decision about the proper route for MSTI if it ever gets built. Polling by Lee Enterprises shows overwhelmingly public support for the judge's conclusion that impacted counties must be included before a decision is made.

Could consultation with impacted local governments have avoided the decision to site the Montana Alberta Tie Line ("MATL") on historic teepee rings? Could consultation with local government have helped DEQ avoid picking a route for MSTI that uses 80% private land in a county that is 75% public land? Hindsight is always tricky and it's difficult to say with certainty that including county commissioners in the process of choosing locations would have alerted MATL and MSTI to the problems they now face. However, there is no doubt that both projects, which have been on the drawing board since at least 2004, would have benefited from more input from people that know the most about the proposed locations. Now, instead of following laws that have been in effect for at least three legislative sessions, we have a furious last-minute effort by shareholder owned companies to rewrite those laws at the expense of ranchers and other rural property owners.

Another problem is the use of an EIS to satisfy the conflicting requirements of MFSA. MEPA specifies that it is the "continuing responsibility of the state of Montana to use **all practicable**

means. . . to protect the right to use and enjoy private property free of undue government regulation" 75-1-103(2)(d), MCA **(emphasis supplied)**. MEPA further requires DEQ "to protect the right to use and enjoy private property free of undue government regulation" . . . **"to the fullest extent possible"** 75-1-102(2) and -201(1), MCA **(emphasis supplied)**. Under MFSA, however, DEQ is only required to site a project on public lands when "their use is as economically practicable as the use of private lands." 75-20-301(1)(h), MCA.

As mentioned the preliminary draft of the EIS for MSTI reveals that 80% of the route that DEQ prefers is on private land in Jefferson County where about 75% of the land is public. That route is preferred by DEQ even over a federally designated corridor that was established by the Bureau of Land Management ("BLM") in a recent Record of Decision (Jan. 2009) as the preferred location for linear energy projects. It is obvious to Jefferson County that NWE and DEQ are afraid to tangle with environmentalists and other public land advocates; it is simply easier to let them take private land. MEPA forbids that approach. DEQ must believe it can rely on MSFA to allow the taking of private land because DEQ believes public land is not "as economically practicable as the use of private lands."

In the case of MSTI, it is far from obvious whether the project is needed or will ever be built. Clearly the project is not fully subscribed because NWE had to extend the "open season" process in the hope that investors will commit money to reserve space on MSTI. But, that has not happened and there is time to fix problems during the interim legislative period; a process that will benefit from the involvement of local government officials.

As citizens, elected to represent your neighbors, you must decide whether locally elected officials should have a meaningful role in major decisions that will impact your lives and those of your constituents. In 2003, the Legislature answered that question by amending MEPA so that your local government would be consulted in state decisions that impact you and your fellow citizens. Until Judge Tucker entered his ruling, the state simply refused to give affect to that voice. Now, in response to Jefferson County's victory, unknown persons want to pass a bill that keeps local governments on the sidelines. That policy has resulted in two major transmission projects floundering and there is no compelling reason to rush through a bill focused on minimizing input from local government. Perhaps the time has come for "responsible state officials" to work with local government to understand the potential impact of projects on the human environment.

Jefferson County asks that vote **do not pass** HB 232.

TALKING POINTS FOR ORAL TESTIMONY
By Peter G. Scott

- The lead story in today's *Independent Record* is about two senate bills offered to increase the role of local government in the process of making decisions that impact citizens where they live.
    - SB 108 deals with areas around National Park; SB 117 deals with more broadly with the process coordination and consultation under the National Environmental Policy Act (NEPA); SB 117 would mandate participation and consideration of litigation to assert local interests.
- So, it's ironic that we are discussing a bill to thwart local government in the consultation process under the Montana Environmental Policy Act (MEPA).
- The Supreme Court has held that MEPA is fashioned after NEPA and courts use federal authority to interpret and apply the state act.
- NEPA provides for meaningful participation by impacted Local Governments.
- The question facing you is this: If you agree (as most do) that it's desirable for local government to participate in federal decision making under NEPA; why is it undesirable for local government to participate in state decision making under MEPA?
- MEPA has always required consultation with state agencies that have special expertise or jurisdiction. That requirement is implemented by rules that substantively include state agencies in the process of preparing the EIS and reimburses their costs;
- In 2003 the legislature added a requirement for state officials to consult with local governments that may be directly impacted by a project; no rule was adopted and nothing changed; Local government have only had the same rights as the general public to comment on state decisions, but no role in fashioning that decision
- The catalyst for this bill was Jefferson County demanding to be involved in the process of choosing a route for the Mountain States Transmission Intertie (MSTI);
- Judge Tucker held that the state must consult with local government *before* any decision is announced to the public.
- This bill is a "patch" that entitles local governments to a letter and a phone call.
- Unlike state agencies consulted under the same provision this bill does put local government in the room to decide what issues will be analyzed and it does not give them input or resources to participate in the analysis.
- You must understand this bill is not limited to MSTI. . . it will apply to every project in the state that requires the preparation of an Environmental Impact Statement.
- Traditionally the legislature has been hesitant to solve litigation by adopting new law; you should not do so now:
    - First, MSTI has been on the drawing board since at least 2004; three legislative sessions have gone by and no one came to you with a proposal to define local government consultation; presumably NWE and DEQ expected the County's to accept whatever they decide. That assumption was wrong and they want you to fix it with a bill that targets the

rights of everyone in the state to have their locally elected officials in the room with critical decisions are made. That is bad policy.

- Second, all indications are that there is no risk of MSTI being built in the foreseeable future; NWE has extended the "open season" period to attract investors through 2011; there is time for these issues to be addressed more thoughtfully during the next legislative interim.

The issue is more complex that it might appear because of the intersection between MEPA and the Major Facility Siting Act "MFSA";

- Section 2 of this bill would amend a provision of MFSA in a way that is inconsistent with the requirements of MEPA
  - On Page 6 the bill proposes language to establish that the MEPA consultation requirement is met for pipelines and transmission lines if the state consults with local governments that *are directly* impacted, BUT the consultation must occur before the EIS is prepared and until that happens there is no way of knowing where a pipeline or transmission line will be constructed.
- One more example of inconsistency between MEPA and MFSA; your colleagues at FRET are fretting at this moment over HB 198 which addresses the taking of private property for transmission lines (or pipelines) that have been granted a certificate of compliance; that certificate is based on an EIS prepared under MEPA
  - MEPA says it is the "continuing responsibility of the state of Montana to use **all practicable means**. . . to protect the right to use and enjoy private property free of undue government regulation" 75-1-103(2)(d), MCA
  - MEPA requires the state of Montana "to protect the right to use and enjoy private property free of undue government regulation" . . . **"to the fullest extent possible"** 75-1-102(2) and -201(1), MCA
  - MFSA, says DEQ is only required to site a project on public lands when **"their use is as economically practicable as the use of private lands."** 75-20-301(1)(h), MCA.
- Jefferson County brought suit because DEQ prefers a route for MSTI that is 80% private in a county that is 75% public instead of federal energy corridor designated in Jefferson County by BLM in 2009 as the preferred location for linear energy projects;
- DEQ has concluded that it is cheaper to condemn private land than it is to fight with BLM or the environmental groups over the use of public land.
- MFSA allows that; But MEPA requires the use of "all practicable means" to protect private property rights "to the fullest extent possible."
- A law that promises local government a letter and a phone call is not enough; This bill will hamstring local governments working to protect local interests. Please, **do not pass HB 232**

MONTANA FIFTH JUDICIAL DISTRICT COURT, JEFFERSON COUNTY

JEFFERSON COUNTY, a political subdivision of the State of Montana, by and through its Board of Commissioners, Petitioner, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana, STATE OF MONTANA, Respondents, and NORTHWESTERN CORP, d/b/a NORTHWESTERN ENERGY, Intervenor.	Cause No. DV-2010-52 **WRIT OF MANDAMUS ORDER GRANTING SUMMARY JUDGMENT FOR PETITIONER AND INJUNCTION**

PROCEDURAL SUMMARY

Petitioner, Jefferson County and Respondent, State of Montana Department of Environmental Quality (DEQ) filed cross-motions for summary judgment.

Petitioner argues that DEQ has failed to satisfy its duty to consult and to obtain comments from Jefferson County prior to releasing the Draft Environmental Impact Statement (EIS) for the Mountain States Transmission Intertie (MSTI) to the public for review and comment. Petitioner seeks to mandate consultation and to enjoin release of the Draft EIS until consultation occurs.

Respondents argue that DEQ's duty to consult and to obtain to comments from Petitioner was satisfied by the scoping process set forth in ARM 17.4.615. NorthWestern Energy argues that DEQ's duty to consult is satisfied by the scoping process and by obtaining the comments of Petitioner after the Draft EIS is issued.

FINDINGS

1. Intervenor, Northwestern Energy, filed an application with Respondents under the Major Facility Siting Act (MFSA) to construct a 500 kv transmission line known as the Mountain States Transmission Intertie (MSTI).

2. DEQ is preparing a draft EIS. It is identifying and evaluating impacts that MSTI will have on the human environment and considering alternatives regarding the proposed transmission line.

3. Petitioner was invited to and did participate in scoping the EIS.

4. Scoping identified the issues to be analyzed in preparation of a draft EIS and determination of the route for MSTI.

5. MEPA at MCA § 75-1-201(1)(c) provides that:

> prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and with any local government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved.

6. Petitioner was not invited and did not participate in preparing the Draft EIS nor in analysis of the issues identified in the scoping process.

7. DEQ has not sought Petitioner's advice how to analyze the issues identified in the scoping process.

8. The word "consult" is not defined in MEPA or the administrative rules adopted under MEPA.

9. Release of the Draft EIS is imminent.

CONCLUSIONS

1. The preparation of a Draft EIS is governed by the Montana Environmental Policy Act (MEPA), Mont. Code Ann. (MCA) Title 75, Chapter 1.

2. The responsible state official is the Director of DEQ action through delegated staff.

3. Petitioner is a local government that will be directly impacted by MSTI.

4. A Draft EIS is a "detailed statement." Section 17.4.603(10), ARM

5. "[P]rior to making a detailed statement" means before the statement is released for public review and comment.

6. The plain and ordinary meaning of "consult" includes "to seek advice or ask the opinion of." Websters II New College Dictionary (2001).

7. DEQ has a duty to consult with Petitioner before, during and after the preparation of a Draft EIS.

8. Petitioner will be injured if DEQ does not satisfy its duty to consult prior to making a detailed statement.

9. No plain, speedy or adequate remedy is available to Petitioner.

ISSUE

Has DEQ satisfied its duty to consult with and obtain the comments of Petitioner regarding the MSTI Project?

ANALYSIS

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. M. R. Civ. P. 56(c).

This case, which appears to be one of first impression, requires the court to interpret and apply the consultation requirement of Section 75-1-201(1)(c), MCA, relative to local governments that may be directly impacted. Undefined terms are given their plain meaning in the context used by the Legislature. *Van Der Hule v. Mukasey*, (2009) 349 Mont 88, 92, ¶10, 217 P.3d 1019, ¶10. The court will avoid interpreting any section in the statute as superfluous and

will give effect to all of the words used. *Montana Trout Unlimited v. Montana DNRC*, 2006 MT 72, ¶ 23, 331 Mont. 483, ¶ 23, 133 P.3d 224, ¶ 23.

Jefferson County will be directly impacted by MSTI. DEQ has a statutory duty therefore to consult with Jefferson County prior to making a detailed statement. Section 75-1-201(1)(c). Prior to preparing the EIS, DEQ conducted a scoping process. Jefferson County participated the scoping process. Following the scoping process, DEQ began preparing the EIS in Draft form. A Draft EIS is a detailed statement. Section 17.4.603(10), ARM. The Draft EIS is ready, or very nearly ready, for release to the public. Public comment on the Draft EIS will be accepted after release.

Jefferson County maintains that scoping plays no role in the consultation process. The DEQ maintains that the duty to consult with local governments that may be directly impacted is satisfied through the scoping process. Neither position is accurate. Scoping of the EIS included seeking advice from local governments that may be impacted by a project regarding their view of issues and alternatives that may require analysis in the EIS. Section 17.4.615, ARM. For that reason the court concludes that scoping is part of the consultation required by Section 75-1-201(1)(c), MCA.

DEQ maintains that consultation with Jefferson County is satisfied and completed after having included Jefferson County in the scoping process. This position is not accurate either. In essence, DEQ argues that it must seek the advice of Jefferson County only to identify the questions. DEQ's position necessarily includes an argument that it is not required to seek Jefferson County's advice about how to answer the questions. The fallacy of the position is self evident. Very little benefit is accorded to the consultant if the consultant is allowed only to identify the questions without providing advice about how the questions should be answered.

Nothing in the statute modifies or limits the consultation duty to a single event, such as scoping. When the operative term (consult) is not modified or qualified, the Court concludes that the duty to consult is not modified or qualified. Consultation must then be a continuing requirement throughout the entire process. DEQ has provided no authority or persuasive

argument to the contrary. For that reason, consultation limited to scoping which ends even before any document is prepared can not satisfy the duty to consult.

DEQ's position is that consultation is satisfied by obtaining comments after publication of the draft EIS. DEQ, in essence, argues that advice will be sought from Jefferson County after the decision is made. The regulatory scheme demonstrates otherwise by providing only that "comments" are accepted and only after the document is prepared. There is no reference to "advice" or "consultation." When different terms are utilized, different meanings must be intended. The statute uses both "consult" and "comment." Clearly there are different requirements when different terms are used in the same sentence.

In addition, an opportunity to attempt to persuade the decision maker to change its decision after the decision has been rendered has far less impact than an opportunity to be involved in providing advice before the decision is made. "Advice" sought after the decision is made cannot compare with the opportunity to provide advice in the process of reaching a decision. Such "advice" is more accurately described as an objection. DEQ's position is unpersuasive.

The Court therefore should mandate that Jefferson County must be consulted and have the opportunity to comment during preparation of the Draft EIS and before it is released for public review. The court further concludes that the on going duty to consult continues after the Draft EIS is released.

The failure of DEQ to consult with Jefferson County is prejudicial to the County because it denies the County an opportunity to participate in analyzing the impact of the various alternatives that will affect Jefferson County.

Absent a mandate to DEQ to consult, the only remedy left to Jefferson County would be an appeal. An appeal occurs only after all of the decisions have been made. An appeal is only an opportunity to object after the decision has been made. As noted above, Jefferson County is entitled to have its advice considered before the decision is made. Jefferson County's rights to consult with DEQ cannot be relegated to an effort to change the decision maker's mind after it

has been fixed upon an improper decision. Jefferson County has no plain, speedy, adequate remedy.

DEQ can not suffer prejudice merely by being required to discharge its duty. Jefferson County will be prejudiced for the reasons described above if DEQ is allowed to proceed in violation of its duty. DEQ should be enjoined from proceeding until it has consulted with and obtained comments from Jefferson County.

NOW THEREFORE, IT IS HEREBY ORDERED as follows:

1. Petitioner's Motion for Summary Judgment is granted.

2. Respondents' Motion for Summary Judgment is denied.

3. The DEQ shall consult with and obtain comments from Jefferson County at all stages of the process.

4. The parties are directed to develop and implement a reasonable process for consultation. An aggrieved party may apply for further relief.

5. The Clerk of the Court will please file this Order and distribute copies to all parties.

Dated: December 21, 2010

LOREN TUCKER
District Judge

c: Mathew J. Johnson/Peter Scott
Edward Hayes/John F. North
John Tabaracci/Robert Erickson